

requests that the Commission revise one aspect of its current radio ownership rules. Specifically, by its *2003 Report and Order*,³ the Commission modified Note 4 to Section 73.3555, so as to terminate the grandfathered status of a combination of stations that complied with the previous ownership rules, but which would exceed the cap permitted by the new rules, if one of the stations in the group files an application for a minor change in its technical facilities to “implement an approved change in an FM radio station’s community of license.”⁴ While Note 4 generally seeks to provide protection to existing facilities, as discussed below, the rule was revised, without discussion, to apply to minor modifications that would not otherwise involve a change in the combination of ownership interests in a market or the number of stations in a market. This approach creates a disincentive for existing licensees to improve their technical facilities, which is contrary to the public interest, and will have an adverse impact on licensees currently in the midst of modifications that conflict with this new rule. Previously, by its *Petition for Reconsideration and Clarification of the Commission’s 2003 Report and Order* submitted on September 4, 2003, Entercom Communications Corp. (“Entercom”) sought reconsideration of this issue, arguing that the change was issued without explanation, was inconsistent with Commission policy, and would hinder furtherance of the Commission’s

Footnote continued from previous page

was extended until October 23, 2006, by Order DA 06-1663, released September 18, 2006.

³ *In the Matter of 2002 Biennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order, 18 FCC Rcd 13620 (Aug. 5, 2003) (hereinafter, “2003 Report and Order” or “2003 R&O”).

⁴ 47 C.F.R. § 73.3555, note 4 (2005). Note 4 defines the types of applications and circumstances to which the Commission’s radio ownership rules will apply.

allotment priorities.⁵ By these comments, Mr. Frandsen reiterates the points raised by Entercom's earlier Petition for Reconsideration, and urges the Commission to revise its rules to permit such modifications where the number of combined stations owned by a licensee in a market would remain unchanged.

Discussion

Recognizing that licensees that acquired stations under the previous local ownership rules should not be penalized for their compliance with the attribution and local ownership rules that were in effect at the time the stations were acquired, the Commission provided for the grandfathering of existing station combinations when it modified its ownership rules in 2003. This has traditionally been the Commission's approach when changing its ownership rules, so as to avoid upsetting the settled business expectations of the parties.⁶ Moreover, to retroactively require the divestiture of station combinations that complied with the earlier ownership rules, but which would not be permitted under the newly adopted rules, is contrary to the public interest, as well as inconsistent with the Administrative Procedures Act.

To that end, by Note 4 to Section 73.3555, the Commission sought to define those circumstances in which the Commission's new rules would not apply, *i.e.* when a combination of stations would be afforded grandfathering protection. Note 4 to Section 73.3555 states, in its entirety:

⁵ Entercom Communications Corporation, *Petition for Reconsideration and Clarification*, MB Docket No. 02-277, submitted Sept. 4, 2003.

⁶ See, e.g., *Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to the Multiple Ownership Standard*, 50 FCC 2d 1046, 1078 (1975) at 1081-82, *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, Report and Order*, 14 FCC Rcd 12903 (1999) at ¶ 133.

Paragraphs (a) through (c) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with §73.3540(f) or §73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled media properties. Paragraphs (a) through (c) will apply to all applications for new stations, to all other applications for assignment or transfer, to all applications for major changes to existing stations, and to applications for minor changes to existing stations that implement an approved change in an FM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (c) of this section may not be assigned or transferred to a single person, group or entity, except as provided in this NOTE or in the Report and Order in Docket No. 02-277, released July 2, 2003 (FCC 02-127).

While seeming to provide protection for existing station combinations, however, the revised Note 4 actually makes the multiple ownership rules applicable to certain minor change applications, which was not previously the case. Significantly, by Note 4, the Commission's multiple ownership rules now apply "to applications for minor changes to existing stations that implement an approved change in an FM radio station's community of license."⁷ The result of this change is to terminate the grandfathered status of an ownership combination if one of the co-owned stations changes its community of license, pursuant to a minor modification application, despite the fact that the number of co-owned stations in the market remains unchanged, and the total number of stations in the market remains unchanged. The Commission's *2003 Report and Order* provides no explanation or justification for the expansion of Note 4, and in fact, the Commission barely mentions Note 4 in the course of its lengthy order. It is well established that the Commission must provide a reasoned basis for changing its rules, something it failed to do in

⁷ 47 C.F.R. § 73.3555, note 4 (2005).

this instance.⁸ As the courts have stated, an “agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”⁹ Without providing such support for the change in its rules, the Commission’s rule change is arbitrary and capricious, and must be reversed.

The termination of a station group’s grandfathering based on the minor modification of a station and an authorized change of its community of license is not an abstract problem, but rather has real-world implications for the licensee of a grandfathered station group seeking to implement a modification that involves a community of license change within the same market. Currently, Mr. Frandsen holds an attributable interest in seven stations (five FMs and two AMs) in a market defined by the contour overlap method, as all of the stations are located outside of any Aribtron-rated market. At the time these stations were combined, the relevant market had greater than 45 stations under Section 73.3555(a)(1) of the Commission’s Rules, and thus, the common ownership of seven stations complied with the Commission’s previous ownership rules.¹⁰ Following the Commission’s *2003 R&O*, however, the number of stations considered part of the relevant market under the revised contour overlap method changed such that the combination of these seven stations would exceed the Commission’s new ownership limits. Given that it was a pre-existing ownership combination, however, the station group received the benefit of the grandfathering protection.

Pursuant to an FM rule making proceeding filed several years prior to the *2003 R&O*, and which was granted and became effective before the effective date of the *2003 R&O*, the

⁸ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

⁹ *Greater Boston Television Corp. v. FCC*, 444 F2d 841, 852 (D.C. Cir. 1970).

¹⁰ Pursuant to Section 73.3555(a)(1), in markets with 45 or more stations a single entity may own up to eight stations, no more than five of which can be in the same service.

Commission approved the change of allotments for a number of stations in the relevant market area, including three stations owned by Mr. Frandsen.¹¹ On June 10, 2004, the Commission adopted a Report and Order implementing changes to the FM Table of Allotments contained in Section 73.202(b). The proceeding involved at least eight different parties and affected nearly a dozen different FM radio allotments. This complex rule making proceeding resulted in a preferential arrangement of allotments, allowed a new local service, and enabled several stations to upgrade or improve their facilities. However, to achieve this result, the communities of license of six stations were changed in the FM Table of Allotments. By this Report and Order, three of Mr. Frandsen's commonly owned stations were instructed to change their communities of license as part of the realignment of allotments. These three stations, as well as five others, were instructed to file FCC Form 301 applications within 90 days of the effective date of the order to effectuate the changes. Subsequently, on July 8, 2004, the Frandsen stations filed the necessary minor modification applications as instructed by the Report and Order.¹² Following the change in communities of license, the impact on the stations commonly owned by Mr. Frandsen would be zero, as Mr. Frandsen will hold exactly the same combination of stations in the market -- seven stations (five FM and two AM). Thus, while the rule making modifies the underlying allotments and communities of license for some of the commonly owned stations, the number of stations owned by Mr. Frandsen in the market remains exactly the same and should rightfully be afforded grandfathering protection.

On September 3, 2004, two months after submitting the minor modification applications, however, the U.S. Court of Appeals for the Third Circuit partially lifted the stay imposed on the

¹¹ *Amendment of Section 73.202(b) FM Table of Allotments, Colorado, Idaho, Utah, and Wyoming*, Report and Order, 19 FCC Rcd 10327 (rel. June 10, 2004).

¹² See FCC File Nos. BMPH-20040708ACL; BPH-20040708ACM; BPH-20040708ACK.

Commission's new radio ownership rules in *Prometheus Radio Project, et al. v. Federal Communications Commission*, 373 F.3d 372 (3rd Cir. 2004).¹³ Thereafter, applicants were required to amend their pending applications to demonstrate compliance with the newly effective ownership rules. Despite the fact that the total number of stations commonly owned by Mr. Frandsen in the relevant market is not changing, and that three of the stations are simply changing their communities of license in order to implement the Commission's preferential order of allocations, the operation of Note 4 to Section 73.3555 would eliminate Mr. Frandsen's grandfathering protection and, barring a waiver or modification of the rule, require that stations be divested from the group of commonly owned stations. Clearly, such an outcome is not in the public interest, and could not have been intended by the Commission.

Although the changes in community of license implemented by Mr. Frandsen were at the direction of the Commission and serve to benefit the public interest, the application of Note 4 would have the unintended consequences of scuttling the commonly owned stations' grandfathering protection, despite the fact that no changes are being made to the number or composition of commonly owned stations. If left unchanged, the revision to Note 4 will harm the public interest by dissuading licensees from making allotment changes that might otherwise be beneficial to adjacent stations and the public. In the future, if a licensee is faced with the prospect of having to divest itself of a co-owned station in order to achieve a minor modification and change in the community of a license of another co-owned station in the market, the licensee will invariably chose to forego the modification, despite the fact that such a change might result in a preferential arrangement of allotments or improved service to the public. In Mr. Frandsen's

¹³ *Prometheus Radio Project, et al. v. FCC*, No. 03-3388 (3rd Cir. Sept. 3, 2004) (modifying the initial motion for stay of effective date of multiple ownership rules on rehearing). See also, Public Notice, "Media Bureau Announces Requirement to File Certain Radio Joint Sales Agreements," DA 04-4035, released January 3, 2005.

case, the change to the stations' communities of license had already been made to the FM Table of Allocations when the Commission's new rules went into effect, leading to the inequitable application of the new rule to the station group's detriment. Upon further consideration of its radio ownership rules, the Commission must repeal the modification made to Note 4 of Section 73.3555, or otherwise clarify that the rule will not apply to minor modification applications to implement an authorized change in community of license so long as the number of commonly owned stations within a market remains unchanged.

CONCLUSION

Left unchanged, the Commission's rule as formulated will harm existing station owners and prevent them from making changes to stations and allotments that could prove beneficial to the public. For the reasons set forth above, Mr. Frandsen respectfully requests that the Commission modify its grandfathering rules to ensure that these unintended effects to not occur, and to ensure that its rules are applied in an equitable fashion.

Respectfully submitted,

M. KENT FRANSEN

By: 

David D. Oxenford
Brendan Holland

Its Attorneys

DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W., Suite 450
Washington, D.C. 20005
(202) 508-6600

Dated: October 23, 2006